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February 4, 2011

ENTERED
Office of Proceedings
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Part of
Public Record

Ms. Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Re: STB Finance Docket No. 30186 (Sub No. 3). Tongue River Railroad Company, Inc. – Construction and Operation – Western Alignment

Dear Ms. Brown:

We are writing on behalf of Tongue River Railroad Company, Inc. to bring the Board's attention to a recent development that bears on the pending July 26, 2010 Petition to Reopen filed in these proceedings by Petitioners Northern Plains Resource Council ("NPRC") and Mr. Mark Fix (hereafter, the "NPRC Petition").[1] In TRRC's September 9, 2010 Reply to the Petition to Reopen, TRRC argued in response to Petitioners' request for reopening on the basis of the leasing of the Otter Creek coal tracts by the State of Montana (a) that the Board had analyzed the potential cumulative environmental impacts associated with mining at the Otter Creek tracts based on reasonable assumptions in *TRRC I* and (b) that the leasing of the Otter Creek tracts did not warrant reopening because the leases provided no new specific information regarding the potential impacts of the mines than was available prior to the leasing and did not make mining at Otter Creek any less speculative for environmental review purposes. In connection with this second point, TRRC noted that the leases were the subject of legal challenges in state court and could be overturned. This letter updates the Board with respect to those legal challenges.[2]

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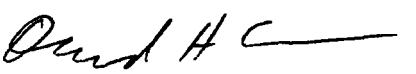
[1] The Petition to Reopen also embraces Finance Docket No. 30186, *Tongue River R.R.—Rail Construction and Operation—In Custer, Powder River and Rosebud Counties, MT*, and Finance Docket No. 30186 (ICC 1985) (*TRRC I*); and Finance Docket No. 30186 (Sub No. 2), *Tongue River Railroad Company—Rail Construction and Operation—Ashland to Decker, Montana.*

[2] On October 8, 2010, Petitioners filed a rebuttal to TRRC's September 9, 2010 reply. On November 1, 2010, TRRC filed a reply to Petitioners' rebuttal.

TRRC cited and attached to its reply two complaints filed against the State of Montana, Montana Board of Land Commissioners, Ark Land Company, Inc. and Arch Coal, Inc. challenging in state court the Montana Board of Land Commissioners' decision to lease the Otter Creek tracts without first conducting an environmental review under Montana's Environmental Policy Act ("MEPA"). The Plaintiffs (which include Petitioner NPRC) claim that the provision of MEPA which exempts such leasing decisions from environmental review contravenes the section of Montana's Constitution which guarantees a public right to a clean and healthful environment. On December 29, 2010, a Montana District Court hearing the two consolidated lawsuits denied the Defendants' motions to dismiss, finding that MEPA would have applied to the Land Board's leasing decision but for the statutory exemption and that Plaintiffs had made "at least a cognizable claim" that the statutory exemption is not constitutional.[3]

This Court's decision, which is attached, offers additional reason to deny reopening on the basis of the Otter Creek leases since the status of those leases remains at best uncertain, underscoring that mining at Otter Creek remains no less speculative than it was at the time that the Board issued its decisions in these proceedings. TRRC thus urges the Board to promptly deny the pending Petition to Reopen.

Respectfully submitted,



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Attorneys for Tongue River Railroad Company, Inc.

cc: All parties of record

[3] MEPA's application at the stage when the lessee seeks a mine permit from the state is not at issue in the proceeding and not in dispute.

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FILED
ALETTA SHANNON
Clerk of District Court, Powder River Co.
JAN 07 2011
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BY: _____ DEPUTY

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT, POWDER RIVER COUNTY

NORTHERN PLAINS RESOURCE COUNCIL, INC., and NATIONAL WILDLIFE FEDERATION, Plaintiffs, vs. MONTANA BOARD OF LAND COMMISSIONERS, STATE OF MONTANA, ARK LAND COMPANY, INC. and ARCH COAL, INC. Defendants.	Cause No. DV-38-2010-2480 and Cause No. DV-38-2010-2481 Judge Joe L. Hegel MEMORANDUM AND ORDER RE MOTIONS TO DISMISS
MONTANA ENVIRONMENTAL INFORMATION CENTER, THE SIERRA CLUB, Plaintiffs, vs. MONTANA BOARD OF LAND COMMISSIONERS, STATE OF MONTANA, ARK LAND COMPANY, INC. and ARCH COAL, INC. Defendants.	

Before the Court are the Defendants' Motions to Dismiss Plaintiffs' Amended Complaints. The parties fully briefed the motions. On December 9, 2010, this Court heard oral argument. Anthony Johnstone and Jennifer Anders represented the Defendant Montana Board of Land Commissioners ("Land Board"). Mark Stermitz and Jeffrey Oven represented Defendants Ark Land Company, Inc. and Arch Coal, Inc. (collectively "Arch Coal"). Jack Tuholske represented Plaintiffs Northern Plains Resource Council ("NPRC") and the National Wildlife

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Federation ("NWF"). Jenny K. Harbine represented Plaintiffs Montana Environmental Information Center ("MEIC") and the Sierra Club. At close of argument, the motions were deemed submitted.

From the record before the Court, the Court now issues its Memorandum and Order:

Memorandum

I. PLEADINGS & PROCEDURE.

Plaintiffs have filed suit seeking a declaratory judgment that the Defendant Land Board failed to conduct a constitutionally-required environmental review prior to entering into a lease of approximately 9,000 mineral acres in Southeastern Montana to the Defendants Arch Coal, for the purpose of strip mining coal. The Land Board's holdings are checker-boarded with privately-held mineral holdings, mostly owned by Arch Coal. Together, the holdings contain approximately 1.2 billion tons of coal. Plaintiffs allege that the mining of the coal may result in a broad array of environmental and socioeconomic effects, including, but not limited to, air and water pollution, boom and bust cycles, and global warming. For the purposes of considering a motion to dismiss under Rule 12(b), the Court must consider true all well-pleaded facts.

Plaintiffs complain that Montana Constitution Article II, Sec. 3, and Article IX, §§ 1, 2, and 3 ("Montana Constitution environmental provisions") require that the State of Montana conduct its business in a manner to protect its citizens' right to a clean and healthful environment, that the chief mechanism the Montana Legislature has used to implement these constitutional protections is the Montana Environmental Policy Act ("MEPA").

Plaintiffs further complain that but for the enactment of MCA § 77-1-121(2), MEPA would have required the Land Board to conduct an environmental study prior to entering into the lease in this case, and that the statute's deferral of the environmental review from the leasing stage to the later mine permitting stage in this case unconstitutionally denies the Plaintiffs' right to the early environmental review, which would preserve the Land Board's right to place mitigating conditions on the coal mining, obtain more favorable financial terms, or to decide not to enter into a lease at all.

The Defendants move to dismiss the Plaintiffs' Amended Complaints arguing:

(1) Plaintiffs lack standing for failure to sufficiently allege harm;

(2) Plaintiffs lack standing because the controversy is not ripe (ready for adjudication) in that the execution of the lease does not result in any harm or imminent threat of harm and that the controversy will not be ripe until the Land Board has reviewed a specific mine plan;

(3) Even in the absence of MCA § 77-1-121(2), MEPA would not apply until the Land Board and the Department of Natural Resources ("DNRC") have issued their final review documents under MEPA, since the lease only grants Arch Coal a contingent right to development.

(4) That properly enacted statutes are presumed constitutional and Plaintiffs have not proven that MCA § 77-1-121(2) is otherwise.

II. FACTS.

The following facts are not disputed. As of March 18 2010, the Land Board leased approximately 8,300 mineral acres to Ark Land, a wholly owned subsidiary of Arch Coal, for the purpose of mining coal. The state-owned acres which are checker-boarded with approximately 6,000 acres of privately owned mineral rights. Together they are referred to as the "Otter Creek tracts" and contain an estimated 1.3 billion tons of coal, which if mined and burned, could yield up to 2.4 billion tons of carbon dioxide.

Pursuant to MCA § 77-1-121(2), the Land Board did not conduct any review of the possible environmental consequences of the mining of the coal prior to entering into the leases. However, the leases are subject to later MEPA environmental review by the Department of Environmental Quality ("DEQ") and the Department of Natural Resources ("DNRC"), as well as Land Board final approval before actual mining could occur.

For the purpose of this motion to dismiss, the Court also assumes that the myriad adverse environmental consequences alleged by Plaintiffs may occur should mining be approved.

III. LAW & DISCUSSION.

A. Standing.

The Land Board and Arch Coal contend that the Plaintiffs do not have standing to bring this action because they do not allege imminent injury and because the process will not be ripe for review until a specific mining plan is considered and ruled upon, that is, the case does not present a "justiciable controversy."

Defendants argue that the any alleged injuries complained of would occur, if at all, from the mining of coal not from the leasing of coal and that Plaintiffs' suit is therefore premature. They further argue that the MEPA review undertaken by the DEQ and the DNRC at the time of further permitting is plenary and encompasses all the alleged damages envisioned by the Plaintiffs, including secondary damages such as global warming. For the reasons set forth in addressing the constitutional issue below, the Court does not necessarily agree with this contention. Arch Coal got something for its money—whether that was merely an option to put forth a mining plan or something sufficient to implicate Montana's constitutional environmental protections is the question that will be further addressed below.

Plaintiffs have alleged injury to members of their organizations who fish, hunt, ranch, farm and recreate in the Otter Creek area and its hydrologically-connected riparian areas. This is sufficient to satisfy the requirement that the Plaintiffs allege existing and genuine rights. Plaintiffs have alleged a constitutional violation of Montana Constitution Article II, Sec. 3, and Article IX, §§ 1, 2, and 3, guaranteeing the public right to a clean and healthful environment. This qualifies as a controversy upon which the court may effectively operate and upon which the Court can issue a final judgment.

The Court concludes that the Plaintiffs have standing.

B. MEPA Application sans MCA § 77-1-121(2).

The Land Board and Arch Coal argue that even if MCA § 77-1-121(2) did not exist, MEPA would not apply at the leasing stage and would only come into play at the permitting stage following the proposal of a specific mining plan, *citing North Fork Preservation Assn v. Dept. of State Lands*, 238 Mont. 451, 778 P.2d 862, (Mont. 1989).

Plaintiffs counter that this does not make sense because (1) there would be no reason to enact the statute if MEPA did not apply at the leasing stage and (2) in the case cited by Defendants, the state agency did, in fact, do a prelease environmental review.

The Plaintiffs have the better of the argument. Defendants argue that it is perfectly clear that issuance of a lease does not trigger MEPA review, *citing North Fork Preservation Assn v. Dept. of State Lands*, 238 Mont. 451, 778 P.2d 862, (Mont. 1989), and that § 77-1-121(2) was merely enacted to clarify that fact. First, if it were so clear, why would it be necessary for the Legislature to pass special legislation to clarify such well-established law? There would be no reason to enact the statute if it were clear that MEPA did not apply at the lease stage.

Second, *North Fork* did not involve a question of whether MEPA applied to the issuance of a lease, but whether a higher degree of review was required than the degree applied by the state agency. In *North Fork*, an environmental organization challenged the Land Board's approval of the drilling of a test well in an environmentally sensitive area adjacent to Glacier National Park without first preparing an Environmental Impact Statement ("EIS"). The Montana Supreme Court held that an EIS was not required because the preliminary environmental review ("PER") that the Land Board had completed prior to issuance of the leases in question concluded that the issuance of the requested oil and gas leases with certain protective stipulations would not be "an action by state government 'significantly affecting the quality of the human environment,' therefore requiring an EIS under § 75-1-201, MCA." *North Fork supra*, 778 P.2d at 865.[1] Thus it is clear that the Land Board did in fact engage in MEPA environmental review prior to issuance of the leases in *North Fork*, which MEPA review informed its decision and the public regarding protective stipulations to include in the leases.

The Court concludes that but for the intervention of MCA § 77-1-121(2), MEPA would apply at the lease stage in this case.

C. Constitutionality of MCA § 77-1-121(2).

MCA §77-1-121(2) exempts the Department of State Lands and the Land Board from complying with Title 75, chapter 1, parts 1 and 2 (MEPA) "when issuing any lease or license that expressly states that the lease or license is subject to further permitting under any of the provisions of Title 75 or 82." MEPA review has been the primary method of insuring that significant state actions were taken only after taking a hard look at the environmental

[1] It should also be noted that *North Fork* involved the drilling of a test well pursuant to a second round of oil and gas leasing and that the Department of State Lands completed an EIS in 1976, prior to issuing the first round of leases.

consequences of such actions. It is undisputed that the Land Board entered into the coal leases without first conducting a MEPA or any other type of environmental review or assessment.

Plaintiffs claim the statutory exemption of coal leasing from MEPA review at the lease stage implicates the clean and healthful environment provisions of the Montana Constitution as applied to this case by exempting the Land Board from seriously considering the environmental consequences before committing the state's resources to development. They argue that the critical "go-no go" decision is taken at the leasing stage and that once the lease is signed, the Land Board gives up the right to change its mind in order to protect the wider environment.

Defendants claim that as applied to this case the "exemption" only delays MEPA review until there is something more tangible to review—a mining plan—that the Plaintiffs lose nothing with the delay, and that because of the combination of statutory requirements, regulations and the contingent nature of the lease, Plaintiffs will be free to raise all their environmental concerns at the further permitting stage, and DEQ, DNRC, and the Land Board can consider all of those concerns in determining whether to approve, modify or deny any proposed mining plans under the lease. They claim nothing is taken off the table.

Plaintiffs reply that although DEQ may be able to consider secondary impacts such as global warming, it has no authority to do anything about them. It is geared exclusively towards more local air and water quality issues.

The question is whether the statute's exemption of the Land Board from a requirement to conduct any sort of initial environmental review at the lease stage in favor of later MEPA review, involves an irretrievable commitment of resources to a project that may significantly adversely affect the human environment. In other words, by signing the lease did the Land Board take something off the table that could not later be withheld and, if so, was that significant enough to implicate the constitutional environmental protections implemented by MEPA?

To adopt the Defendants' reasoning with respect to the constitutionality of MCA § 77-1-121(2) would allow the Land Board to convert public property rights to private property rights, stripping away its special protections before even considering possible environmental consequences. Once converted from public property to private property, further review by the

Land Board and other state agencies would appear to be restricted to its purely regulatory functions, with the need to treat the now private property rights with deference.[2]

The remaining question is whether this state action is sufficient to implicate the constitutional protection of the clean and healthful environment? If so, the right to a clean and healthful environment is a fundamental right and any rule that implicates that right is subject to strict scrutiny and can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective. *Montana Environmental Information Center v. Dept. of Environmental Quality*, 296 Mont. 207, ¶ 63, 988 P.2d 1236, ¶ 63, (Mont. 1999).

At this point, it appears that Plaintiffs have made at least a cognizable claim that MCA § 77-1-121(2) is not constitutional. If they can prove that, then some form of MEPA review would apply at the lease stage.

Order

IT IS ORDERED:

1. The motions to dismiss are denied.
2. The Clerk of Court shall file this document and mail or deliver copies to counsel of record at their last known addresses.

Dated this 29th day of December, 2010.

Joe L. Hegel, District Judge

SIXTEENTH JUDICIAL DISTRICT COURT SEAL RAVALLI COUNTY MONTANA

pc: Anthony Johnstone
Jennifer Anders
Mark Sternitzky
Candace F. West / Tom Butler
Jeff Over
Jack Tuholske
Douglas Hannold
Gerry Hanking
P.R.Co. Commissioners

[2] To the extent that Defendants' argue that nothing is taken off the table, they may be judicially stopped from limiting the Land Board and other agencies' later MEPA review to purely regulatory issues.

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February 2011, I have caused a copy of the foregoing Letter of Tongue River Railroad Company, Inc. to be served by first-class mail, postage prepaid, on counsel for the parties of record in STB Finance Docket Nos. 30186, 30186 (Sub-No. 2), and 30186 (Sub No.3).

David H. Coburn